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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-011434 02/25/2016

HONORABLE DOUGLAS GERLACH

CLERK OF THE COURT
A. Quintana
Deputy

LAUREN KUBY

JOY E HERR-CARDILLO

v.

STATE OF ARIZONA

MICHAEL JOHN HRNICEK

KORY A LANGHOFER

MINUTE ENTRY

This is an action in which plaintiff Lauren Kuby "seeks a Declaratory Judgment that Senate Bill 1241 enacted by the Fifty-second Legislature, First Regular Session 2015 ("SB 1241") is unconstitutional because it violates the title and single subject provisions of the Arizona Constitution, Article 4, pt. 2, §13 and the home-rule provision of the Arizona Constitution, Article 13, §2." [Complaint (9/30/15) at 1, para. 1] Although defendant State of Arizona filed a motion to dismiss (11/12/15), demonstrating the State's intent to resist Kuby's efforts, a motion to intervene was filed on behalf of the Arizona Food Marketing Alliance, the Arizona Restaurant Association, the Arizona Retailers Association, and NAIOP Arizona, which the court has considered along with the response filed on Kuby's behalf and the intervenors' reply.[1]

Intervention is governed by Ariz. R. Civ. P. 24. The motion urges the court to recognize intervention as a matter of right under Rule 24(a)(2) and, otherwise, to permit intervention under

[1] The State chose not to participate in the briefing regarding intervention. The parties agreed that the motion should be decided without oral argument. [Stipulation Regarding Processing of Pending Motions (12/4/15) at 2]

Rule 24(b)(2).[2] Because the intervenors' objective in this action is the same as the State's, namely a ruling that upholds the constitutionality of SB 1241, and because the intervenors' participation would prolong the outcome of the case while driving up the expense of the litigation needlessly, the motion must be denied.

Rule 24(a)(2) – Intervention as of Right.

Rule 24(a)(2) requires, among other things, a showing that the intervenor's interests are not "adequately represented by existing parties." *See also Mitchell v. City of Nogales*, 83 Ariz. 328, 331, 320 P.2d 955, 957 (1958) (affirming denial of motion to intervene: a party who is "adequately represented . . . has no intervention as of right"); *Woodbridge Structured Funding, LLC v. Arizona Lottery*, 235 Ariz. 25, 28, ¶13, 326 P.3d 292, 295 (2014).[3]

When an existing party and the proposed intervenor share the same objective, courts recognize a presumption that the former will adequately represent the interests of the latter. *E.g., Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 951 (9th Cir. 2009) (affirming denial of motion to intervene: "Where the party and the proposed intervenor share the same ultimate objective, a presumption of adequacy of representation applies" (citation and internal quotation marks omitted)); *Shea v. Angulo*, 19 F.3d 343, 347 (7th Cir. 1994) (same: "Where a prospective intervenor has the same goal as the party to a suit, there is a presumption that the representation in the suit is adequate"); *Moosehead Sanitary Dist. v. S.G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979) (same: "Where the party seeking to intervene has the same ultimate goal as a party already in the suit, courts have applied a presumption of adequate representation"); *Commonwealth of Virginia v. Westinghouse*, 542 F.2d, 214, 216 (4th Cir. 1976) (same: "When the party seeking intervention has the same ultimate objective as the party to the suit, a presumption arises that its interests are adequately represented, against which the petitioner must demonstrate adversity of interest, collusion, or nonfeasance").[4] That presumption is especially

[2] No statute confers either an unconditional or conditional right to intervene in the circumstances here. Therefore, neither Rule 24(a)(1) nor Rule 24(b)(1) apply.

[3] In 1973, our Supreme Court rejected an adequate representation argument that relied on *Mitchell* because, at the time, Arizona Rule 24, unlike its federal counterpart, did not include language regarding the adequacy of representation accorded by existing parties. *Saunders v. Superior Court*, 109 Ariz. 424, 426, 510 P.2d 740, 742 (1973). A 1996 amendment to Rule 24(a) "added a provision which indicates that an application for intervention as of right may be denied where the interests of the applicant are being adequately represented by existing parties to the action." Daniel J. McAuliffe & Shirley J. McAuliffe, *Arizona Civil Rules Handbook* 402 (2015).

[4] Arizona courts may rely for guidance on federal court decisions when interpreting state rules that are patterned after federal rules. *Hedlund v. Ford Mktg. Co.*, 129 Ariz. 176, 178, 629 P.2d 1012, 1014 (App. 1981); *Nesbitt v. Nesbitt*, 1 Ariz. App. 293, 296, 402 P.2d 228, 231 (1965). Unpublished federal court decisions cited in this minute entry are among those within what Ariz. R. S. Ct. 111(d) contemplates.

warranted when, as here, the government is the existing party whose objective the intervenors share. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (affirming denial of motion to intervene even though intervenors had a significantly protectable interest at stake); *Herriman City v. Swensen*, No. 2:07-CV-711 TS, 2007 WL 4270590, at *1 (D. Utah Nov. 30, 2007) (denying motion to intervene: although "[i]t is undisputed that the Proposed Intervenors have an interest that may be impaired," "the general presumption that representation is adequate . . . should apply when the government is a party pursuing a single objective" (citation and internal quotation marks omitted)); *see also Planned Parenthood Arizona, Inc. v. American Ass'n of Pro-Life Obstetricians & Gynecologists*, 227 Ariz. 262, 280, ¶60, 257 P.3d 181, 199 (2011) (affirming denial of motion to intervene by intervenor who established a protectable interest). And even more so, that presumption applies when, as here, "a State statute is challenged and a proposed intervenor shares a common objective with the State to defend the validity of the statute." *United States v. North Carolina*, No. 1:13CV861, 2014 WL 494911, at *3 (M.D.N.C. Feb. 6, 2014) (denying motion to intervene (citing *Stuart v. Huff*, 706 F.3d 345, 352 (4th Cir. 2013) (affirming denial of motion to intervene)).[5]

Overcoming the presumption of adequate representation requires a "very compelling showing." *Arakaki*, 324 F.3d at 1086; *see also Perry*, 587 F.3d at 952. The motion maintains (at 8) that the State will not adequately represent the intervenors' interests for two reasons: the State cannot be relied upon to frame the legal argument defending the constitutionality of SB 1241 in a way that the intervenors approve, and unlike the State, the intervenors intend to retain expert witnesses and undertake discovery. Differences in litigation strategy, however, including differences about how best to frame issues, are not sufficient to establish inadequate representation. *E.g.*, *Perry*, 587 F.3d at 954 ("Mere differences in litigation strategy are not enough to justify intervention as a matter of right"); *United States v. City of New York*, 198 F.3d

[5] *See also Ingebretsen on Behalf of Ingebretsen v. Jackson Public School Dist.*, 88 F.3d 274, 281 (5th Cir. 1996) (affirming denial of intervention in case challenging constitutionality of school prayer statute because state attorney general was capable of defending intervenors' rights); *Keith v. Daley*, 764 F.2d 1265, 1270 (7th Cir. 1985) (anti-abortion group denied leave to intervene in suit challenging constitutionality of Illinois statute regulating abortion because state was defending challenge adequately); *United Nuclear Corp. v. Cannon*, 696 F.2d 141, 144 (1st Cir. 1982) (intervenor's interest in defending a Rhode Island statute adequately represented by the state); *United States v. South Bend Cmty. School Corp.*, 692 F.2d 623, 627 (7th Cir.1982) (neither non-profit corporation nor NAACP had right to intervene in school desegregation case when they had not shown inadequacy of representation by government, which shared ultimate objective of proposed intervenors); *Pennsylvania v. Rizzo*, 530 F.2d 501, 505 (3d Cir. 1976) (Fire Officers Union not allowed to intervene in absence of showing that city did not represent union's interests adequately); *Idaho Bldg. and Const. Trades Council, AFL-CIO v. Wasden*, No. 1:11-cv-00253-BLW, 211 WL 5154286, at *2 (D. Ida. 2011) (intervention denied because "both the Attorney General and [intervenor] share the same ultimate objective—ensuring that the Open Access to Work Act and the Fairness in Contracting Act is upheld"); *see generally New Jersey v. New York*, 345 U.S. 369, 372–73 (1953) (principle that state is deemed to represent all its citizens when a party to suit involving a matter of sovereign interest is "necessary recognition of sovereign dignity, as well as a working rule for good judicial administration").

360, 367 (2d Cir. 1999) (affirming denial of motion to intervene: "Representation is not inadequate simply because . . . the applicant and the existing party have different views on the facts, the applicable law, or the likelihood of success of a particular litigation strategy").

The motion's attempt (at 7) to create the appearance of distance between the State and the intervenors is unconvincing. That the State and the intervenors want the same outcome, namely a result that upholds the constitutionality of SB 1241, is not disputed. As such, the intervenors' asserted need to protect their purported interests reflects only that their differences with the State "lie not in the ultimate objective but in [their] disagreement with how to achieve that objective." *Evans v. Buchanan*, 130 F.R.D. 306, 312 (D. Del. 1990) (denying motion to intervene). That is insufficient to establish inadequate representation. *E.g., Stuart*, 706 F.3d at 353 ("[D]isagreement over how to approach the conduct of the litigation is not enough to rebut the presumption of adequacy"); *see also One Wisconsin Institute, Inc. v. Nichol*, 310 F.R.D. 394, 399 (W.D. Wis. 2015) (denying motion to intervene: "The proposed intervenors contend that they want to make an argument in support of the challenged statutes that the attorney general and the current defendants will not make. . . . The proposed intervenors are not pursuing a different goal, and their views on the best legal arguments to use to reach that goal amount to little more than post-hoc quibbles with the litigation strategy that the attorney general has pursued in this case; such quibbles do not support intervention as of right" (citation and internal quotation marks omitted)); *Massachusetts Food Ass'n v. Sullivan*, 184 F.R.D. 217, 224 (D. Mass. 1999) (same: concluding that "strategic differences [and] different uses of caselaw . . . [are not] grounds for a finding of inadequate representation").[6]

In short, the motion fails to make the required compelling showing that the State's efforts to achieve the same, single goal that the intervenors seek are somehow inadequate.

Rule 24(b)(2) – Permissive Intervention.

Rule 24(b)(2) provides for permissive intervention "when [the proposed intervenors'] claim or defense and the main action have a question of law or fact in common." The mere

[6] The intervenors' reliance [Motion at 6, Reply at 4] on *Saunders v. Superior Court*, 109 Ariz. 424, 510 P.2d 740 (1973) does not assist the inquiry here, nor does their reliance [Motion at 6] on *Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm'n*, 160 Ariz. 350, 773 P.2d 453 (1989). Adequate representation was not an issue that those courts considered when deciding those cases. [See note 3 above] As noted above, *Planned Parenthood*, on which the motion (at 8) and reply (at 4) also rely, affirmed the denial of intervention requested by a party even though it had a recognized protectable interest. 227 Ariz. at 280, ¶60, 257 P.3d at 199. Moreover, and contrary to what the reply urges, on the facts here, the proposed intervenors are neither alike nor even similar to those parties in *Planned Parenthood* whose intervention was allowed with respect to a single issue of personal conscience. And, *Idaho Farm Bureau Fed'n v. Babbitt* is equally unhelpful [Reply at 4] because intervention in that case was, to a not insignificant extent, allowed when the defendant government agency became seemingly antagonistic to the intervenors and their interests. 58 F.3d 1392, 1398 (9th Cir. 1995).

existence of a common question of law or fact, however, does not necessarily end the inquiry. Instead, the decision is left to the court's discretion. *E.g., United States Postal Serv. v. Brennan*, 579 F.2d 188, 192 (2d Cir. 1978) (affirming denial of permissive intervention: "The trial court's discretion is very broad"); *see also* 7C Charles Alan Wright et al., *Federal Practice and Procedure* §1923 (3d ed.) (concluding that, because trial courts are afforded great deference and decisions reversing the denial of permissive intervention are rare, "it would seem sounder to dismiss out of hand appeals from a denial of permissive intervention"). When deciding, the court considers whether "the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Ariz. R. Civ. P. 24(b)(2).

Some courts have concluded that, as here, a showing of adequate representation by an existing party alone warrants denial of permissive intervention. *E.g., Hoots v. Commonwealth of Pennsylvania*, 672 F.2d 1133, 1136 (3rd Cir. 1982) (affirming denial of motion to intervene); *Animal Legal Defense Fund v. Otter*, 300 F.R.D. 461, 464 (D. Ida. 2014) (denying motion to intervene); *Menominee Indian Tribe v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996) (same); *see also Mitchell*, 83 Ariz. at 332, 320 P.2d at 958 (concluding that "[a]s long as [the intervenor's] interests are adequately protected it is not an abuse of discretion to deny [permissive] intervention").

But, in any event, the motion, in effect, concedes that undue prejudice and delay will result if intervention is granted. More than once, the motion states (at 8-10) that, if intervention is permitted, the intervenors intend to retain expert witnesses and undertake discovery beyond what the other parties think is necessary and well beyond what is, by all reasonable appearances, required to reach a reasoned decision on the merits. Indeed, the motion states expressly that the intervenors intend to devote "substantial time and resources" to discovery. [Motion at 10 (emphasis added)] "Substantial time" can mean only that a decision on the merits will be delayed. "Substantial resources" means not only making the litigation more expensive for the other parties, but, as presented, suggests an intent to drive up that expense while seemingly indifferent to whether doing so will jeopardize any other party's ability to participate effectively. [See Motion at 11 (acknowledging that "none of the existing parties has the means" to keep up with what the intervenors plan on doing if allowed to intervene)] Thus, when taking what the motion says at face value, it becomes difficult to imagine a more apparent example of a case in which intervention would, as one court concluded on facts less compelling than those here, "complicate the discovery process, potentially unduly delay the adjudication of the case on the merits, and generate little, if any, corresponding benefit to the existing parties." *North Carolina*, 2014 WL 494911, at *5 (citing *Brock v. McGee Bros. Co.*, 111 F.R.D. 484, 487 (W.D.N.C.1986) (denying permissive intervention where interests were adequately represented and intervention would needlessly increase the cost and delay disposition of the case); *see also Perry*, 587 F.3d 955-56 (concluding that intervention was unnecessary because the existing parties were capable of developing "a complete factual record" and "in all probability [intervention] would consume

additional time and resources of both the Court and the parties that have a direct stake in the outcome of these proceedings"); *One Wisconsin*, 310 F.R.D. at 400 ("[P]ermitting the proposed intervenors to expand the substantive scope of this case will hinder, rather than enhance, judicial economy"); *Resolution Trust Corp. v. City of Boston*, 150 F.R.D. 449, 455 (D. Mass. 1993) (denying motions to intervene: intervenors failed to show that becoming parties "would increase the likelihood of a just, speedy, and efficient outcome. . . . [T]he delay and additional costs the[] [intervenors'] presence as defendants would create would be a needless and ineffectual sacrifice").

In short, given the record here, permitting intervention would produce no more than the submission of "alternatively phrased legal arguments" while increasing substantially "the demands of case management for the court and the [existing] parties." *Massachusetts Food Ass'n*, 184 F.R.D. at 225 (denying motion to intervene).

IT IS ORDERED:

1. The motion to intervene that was filed on behalf of the Arizona Food Marketing Alliance, the Arizona Restaurant Association, the Arizona Retailers Association, and NAIOP Arizona is denied.

2. If the pending motion to dismiss is denied, the proposed intervenors may seek leave to file an amicus brief on the merits. But otherwise, their participation in this proceeding in any other way is neither required nor helpful.[7]

[7] See e.g., *Resolution Trust*, 150 F.R.D. at 455 (recognizing that submission of an amicus brief will allow "the court to receive the benefit of any perspectives or arguments the proposed intervenors may wish to advance in this case"); *Massachusetts Food*, 184 F.R.D. at 225 (same); *Brock*, 111 F.R.D. at 487 (same); *North Carolina*, 2014 WL 494911, at *5 (similar).